Filed 9/30/03 Eilken v. Charlston, Revich & Williams CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

TOM EILKEN, Plaintiff and Appellant, v. CHARLSTON, REVICH & WILLIAMS et al., Defendants and Respondents.	B153592 (Los Angeles County Super. Ct. No. BC245320)

Appeal from an order of the Superior Court of Los Angeles County. Richard C. Hubbell, Judge. Affirmed.

Tom Eilken, in pro. per., for Plaintiff and Appellant.

Charlston, Revich & Chamberlin, Jeffrey A. Charlston and Thomas S. Flynn for Defendants and Respondents.

Appellant Tom Eilken appeals from the trial court's order granting respondents' motion to strike Eilken's complaint pursuant to Code of Civil

Procedure section 425.16, the "anti-SLAPP statute."[1] The essence of Eilken's complaint is that defendants lied about personally serving him with a motion for summary judgment (MSJ) in the legal malpractice lawsuit he had brought against them and he did not actually receive notice until following the MSJ hearing, thereby effectively precluding him from responding to the MSJ. The gravamen of the motion to strike in the case at bench is that Eilken could not succeed on his claims as a matter of law. We agree that he cannot prevail on his tort claims and shall therefore affirm the court's ruling on the anti-SLAPP motion.

PROCEDURAL HISTORY

Proceedings underlying this complaint and motion to strike

Eilken sued his attorneys for legal malpractice for inter alia failing to contact his sole witness, and they brought a motion for summary judgment. The MSJ was set for a hearing date of July 24, 1998. Respondents used the Proofs of Service to demonstrate that the moving papers for the MSJ were delivered by messenger on June 26, 1998, to the exact address specified by Eilken as the address where all notices and papers should be sent, the same address on the instant complaint and on Eilken's appellate briefs in this matter. Eilken did not

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[1] "SLAPP" is an acronym for Strategic Lawsuits Against Public Participation. (See *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.) "An order granting or denying a special motion to strike shall be appealable under Section 904.1" (Code Civ. Proc., § 426.16, subd. (j).) Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

The motion the successful granting of which results in this appeal was brought by attorney M. Hank Etess, M. Hank Etess & Associates (collectively, "Etess," who were defendants in the legal malpractice action brought by Eilken after loss of his rear-end personal injury accident lawsuit) and Charlston, Revich & Willams, LLP, Jeffrey A. Charlston and Robert P. Mitrovich (counsel for Etess in the malpractice action). The gist of Eilken's current complaint against them is that their alleged lying about properly serving him papers for the MSJ in the legal malpractice lawsuit was an abuse of process and amounted to extrinsic fraud and deceit.

appear on July 24 for the MSJ hearing, at which time the trial court stated the MSJ "was properly served . . . " and ruled for defendants.

Eilken filed an ex parte application asking the court to suspend its ruling on the MSJ and allow him time to respond to the motion. Eilken argued he had not been properly served with the MSJ and related papers. Instead, while he was on vacation and/or receiving medical treatment, the Etess defendants served him by hand delivery through the mail slot in the locked front door of the address he had specified for service.[2] At the ex parte hearing, the trial court stated the MSJ had "proper proof of service showing service on June 26th by *personal service* on Mr. Eilken." (Italics added.) Finally, the court stated "It's not the Defendants' fault that your office was closed and you had no secretary or no one receiving your papers."

Appellant appealed the summary judgment and won reversal as to Hill, who later won after trial. The appeal as to the Etess defendants was dismissed because the cross-complaint between the same parties had not been resolved, so there was no final judgment. (*American Alternative Energy Partners II v. Windridge* (1996) 42 Cal.App.4th 551, 556-557; see also *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 732, 736-744 9; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 77, pp. 131-132l.) The record before us does not explain what, if anything, occurred regarding the Etess complaint and cross-complaint upon dismissal of that appeal.[3]

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[2] Eilken claims that the MSJ papers were "delivered without notice in a plain unmarked manila envelope through mail slot of the locked and vacant 1-story single office building" to which address he had requested service be made. Respondents do not contest this version of service and instead argue that this procedure constituted proper service.

[3] Two related appeals have been decided by Division Two of this district in unpublished opinions. The first appeal, from summary judgment for Eilken's former attorneys Hill and Etess (*Eilken v. Hill et al*, B126697, March 29, 2000), resulted in a reversal as to Hill and a dismissal as to Etess for lack of a final

The complaint

On February 20, 2001, Eilken in propria persona filed a complaint for damages for abuse of process and extrinsic fraud and deceit against his former attorneys Hill and Etess, the malpractice attorneys for Etess, and a messenger service.[4] The complaint alleges that four falsified declarations erroneously showed that Eilken was personally served and oral notice was given in the previous litigation. Eilken alleges that no notification was ever given to him directly or indirectly and that his answering machine stated the office would be closed for one month and that he was thereby deprived of "his right to due process by defendants' chicanery in continuing to mislead the court [regarding proper service], as well as defraud the plaintiff." Thus, because the trial court was tricked into believing Eilken had been properly served, Eilken was not allowed to respond to the MSJ brought in the legal malpractice action he brought against Etess and others. (Cf. *Carlton v. Quint* (2000) 77 Cal.App.4th 690, 696, where the allegedly improperly served plaintiff appeared and opposed the MSJ on the merits.)

The complaint further alleges that defendants continued their deception to the appellate court in their representations that Eilken was personally served in the underlying litigation. Eilken allegedly found that Etess and Hill through attorney Mitrovich "had placed or approved the "x"s in the four (4) certified Proofs of Service" over the messenger's signature. The same allegedly false declarations in

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judgment; a cross-complaint was then pending by Etess against Eilken. That decision specifically did not reach the issue of whether Eilken had been properly served with the MSJ.

More recently, in *Eilken v. Hill* (B158802, March 28, 2003), Division Two affirmed a judgment after a court trial for attorney Bruce Hill. The trial court found Hill did not violate his professional duties, that bifurcation as to the claims against Hill and Etess was appropriate given the procedural history, and that Eilken provided an inadequate record to determine if the trial court erred in excluding certain witnesses and if such exclusion was prejudicial.

[4] Eilken dismissed the messenger service without prejudice.

the proofs of service constituted the extrinsic fraud and deceit alleged in the second cause of action. The instant complaint also sought punitive damages.

Motion to strike

Respondents filed a motion to strike the complaint pursuant to Code of Civil Procedure section 425.16. The motion was based on proper service as a matter of law on Eilken in the malpractice action and an argument that such service therefore could not be the "basis of any action against Etess or the attorneys who represented him in the Malpractice Action, let alone actions for abuse of process and fraud."[5] Respondents concurrently demurred to both causes of action and argued there was no possibility, much less a probability, that Eilken would prevail on the complaint.[6]

In response, Eilken disputed respondents' characterization of him as a "vexatious litigant." A man in his eighties, he apologized for delay in filing his response due to heart problems and treatment. The basis of his action is that the trial court in the malpractice action, Hon. Valerie Baker, and the appellate court in the previous appeal were misled by respondents' documents where "personal service" was checked although no such personal service occurred. Eilken contended there is a reasonable probability he will prevail on the merits because he was not properly served under Code of Civil Procedure section 1011.

Court's ruling

The court in its minute order for August 29, 2001, granted the section 425.16 motion, stating: "The Plaintiff's complaint arises from Defendants' actions

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[5] Moreover, because the complaint arises from respondents' statements and actions in connection with an issue under review by a judicial body, they assert that section 425.16 is applicable to this litigation. Eilken does not dispute this assertion but part of the appeal.

[6] In order to establish the procedural history of the litigation, respondents sought judicial notice of documents and transcripts in the malpractice lawsuit, case BC134359.

made in furtherance of the underlying litigation. Thus, Code of Civil Procedure Section 425.16 is applicable. The burden then shifts to the Plaintiff to make a prima facie showing of a probability that the Plaintiff will prevail on either claim alleged in Plaintiff's complaint. Plaintiff has not met his burden. The Defendants are entitled to recover attorney's fees and costs under Code of Civil Procedure section 425.16(c)."[7] This appeal follows.

CONTENTIONS ON APPEAL

Appellant contends that he was improperly (and not "personally") served in the MSJ lawsuit; that respondents lied to the court about personally serving him, thus depriving him of an opportunity to respond to the MSJ; and that respondents' conduct in the previous lawsuit amounts to abuse of process and extrinsic fraud for which he is currently suing. He claims a probability of success on the merits, which would defeat respondents' anti-SLAPP motion.

Respondents contend the trial court was correct because, as a matter of law, the claims fall under the anti-SLAPP provisions of section 425.26 and Eilken could not make a prima facie showing his claims could succeed, because Eilken was properly served; because he has not presented admissible evidence to prove his probability of success as to the elements of abuse of process or extrinsic fraud; and because the claims are barred by the litigation privilege. Respondents seek affirmance and attorneys fees and costs on appeal.

DISCUSSION

1. Section 425.16.

As our Supreme Court stated in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1111-1113, footnote in original: "Section 425.16 [[8]] provides, inter alia, that 'A cause of action against a person arising from

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[7] The court took the demurrer off calendar as moot. Defendants submitted a memorandum of costs including $15,728 in attorney fees.

[8] "In its entirety, section 425.16 reads:

"(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

"(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

"(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

"(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

"(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to [Code of Civil Procedure] Section 128.5.

"(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

"(e) As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of

any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.' (§ 425.16, subd. (b)(1).) 'As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, *or judicial proceeding*, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or *judicial body*, or any other official proceeding authorized by law . . . .' (*Id*., subd. (e).)" (Italics added.) Defendants' response to the MSJ qualifies, thus meeting the moving parties' initial burden under section 425.16. (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1365, 102 Cal.Rptr.2d 864 [disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th 53, 68, fn. 5]; *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083.)[9]

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public interest." (*Briggs*, *supra*, 19 Cal.4th 1106, 1111, fn. 4 [omitting portions of the statute].)

[9] As described in *Wilcox* (1994) 27 Cal.App.4th 809, 815, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th 53, 68, fn. 5, "Litigation which has come to be known as SLAPP is defined by the sociologists who coined the term as 'civil lawsuits . . . that are aimed at preventing citizens from exercising their political rights or punishing those who have done so.' (Canan & Pring, Strategic Lawsuits Against Public Participation (1988) 35 Social Problems 506.) The paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants' continued political or legal opposition to the developers' plans. [Citations.] SLAPP's, however, are by no means limited to environmental issues (see, e.g., *Brownsville Golden Age Nursing Home, Inc. v. Wells* (3d Cir. 1988) 839 F.2d 155, 157 [suit by nursing home against private citizens who had complained to government officials about conditions in plaintiff's facility]), nor

"Section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th 53, 67; accord *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal. 4th 728, [74 P.3d 737, 740, 3 Cal.Rptr.3d 636, 639].)

To satisfy plaintiff's burden to show probability of prevailing "the plaintiff need only have '"stated and substantiated a legally sufficient claim."' [Citations.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) "Only a cause of action that satisfies both prongs of the anti-SLAPP statute--i.e., that arises from

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are the defendants necessarily local organizations with limited resources. (See, e.g., *Sierra Club v. Butz* (N.D.Cal. 1972) 349 F.Supp. 934.) The favored causes of action in SLAPP suits are defamation, various business torts such as interference with prospective economic advantage, nuisance and intentional infliction of emotional distress. (Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs* (1993) 26 Loyola L.A. L.Rev. 395, 402-403.) Plaintiffs in these actions typically ask for damages which would be ruinous to the defendants. (See, e.g*., Protect Our Mountain v. District Court*, [(Colo. 1984)] 677 P.2d [1361,] 1364; [developer sought $10 million compensatory and $30 million punitive damages]; Barker, *supra*, 26 Loyola L.A. L.Rev. at p. 403 [estimating damage claims in SLAPP's average $9.1 million].)"

protected speech or petitioning *and* lacks even minimal merit--is a SLAPP, subject to being stricken under the statute." (*Id*. at p. 89.)

In determining whether plaintiff has demonstrated a probability of prevailing, "The evidence presented must be admissible (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 654 [49 Cal.Rptr.2d 620] [disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th 53, 68, fn. 5]) and the trial court does not weigh the evidence. (*Paul for City Council v. Hanyecz*, *supra*, 85 Cal.App.4th at p. 1365.) Rather, a probability of prevailing is established if the plaintiff presents evidence establishing a prima facie case which, if believed by the trier of fact, will result in a judgment for plaintiff. (*Ibid*.) [¶] If the plaintiff meets its burden the motion must be denied. (*M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 627 [107 Cal.Rptr.2d 504]; *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 745-746 [36 Cal.Rptr.2d 687].)" (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1188-1189.)

On appeal, both issues are reviewed de novo. Thus, we review independently whether the complaint arises from exercise of a valid right to free speech and petition and if so, whether the plaintiff established a probability of prevailing on the complaint. (*Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 919.)

2. Evidence regarding service of the MSJ papers.

The MSJ was set for a hearing date of July 24, 1998. Respondents use the Proofs of Service to demonstrate that the moving papers for the MSJ were delivered by messenger on June 26, 1998, to the exact address specified by Eilken as the address where all notices and papers should be sent, the same address on the instant complaint and on Eilken's appellate briefs in this matter. Eilken did not appear on July 24 for the MSJ hearing, and the trial court stated the MSJ "was properly served . . . ."

Respondents contend there is uncontradicted evidence supporting proper service pursuant to section 1011, subdivision (a), which provides in part: "When there is no person in the office with whom the notice or papers may be left for purposes of this subdivision at the time service is to be effected, service may be made by leaving them between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office . . . ." (See *January v. Superior Court* (1887) 73 Cal. 537, 538 ["The service of the notice, which was made by depositing a copy thereof through the door into the postal-box which had been placed there for the reception of documents, was sufficient. It cannot be said that a box so clearly designated by an attorney as the proper place for the deposit of letters and papers during his absence from the office is not a 'conspicuous place' within the meaning of section 1011 of the Code of Civil Procedure."].) They assert that, although the documents were not personally placed in the hands of Mr. Eilken, the proofs of service do not so state; rather, they state the papers were personally delivered to the offices at the address Eilken had provided. Indeed, they quote Eilken's statements that he later found them with the junk mail and advertisements when he returned to the office on August 3, 1998.[10]

The proof of service of the MSJ states under penalty of perjury that the MSJ "is being served on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope address as follows:

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[10] Moreover, respondents state Eilken acknowledges that his wife picked up the mail in mid-July. Eilken so states in arguing that if the legal papers had been mailed to the office, he would have received them when his wife picked up the mail in mid-July 1998. However, Eilken also argues that the plain, unmarked envelope was not mailed and was put with the junk mail to be opened later. He argues that had respondents properly mailed the MSJ, he would have received them and opened them in time to reply in that lawsuit.

"**SEE ATTACHED SERVICE LIST[11]**

"**. . .**

"**X** ***(BY PERSONAL SERVICE)** ALLSTAR Messenger Service, 8929 Exposition Boulevard, Los Angeles, California 80034 delivered such envelope by hand to the offices of the addressee."

Plaintiff admits he eventually received the MSJ, which was concededly delivered to his office address, though apparently in an unmarked envelope through a mail slot. His principal argument seems to be that he was not "personally" served, as "x'd" on the proof of service and that the trial court considering the MSJ was tricked into believing that personal or otherwise proper service had been effected despite no personal service and noncompliance with Code of Civil Procedure section 1011, which provides:

"The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:
(a) If upon an attorney, service may be made at the attorney's office, by leaving the notice or other papers in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or with a person having charge thereof. When there is no person in the office with whom the notice or papers may be left for purposes of this subdivision at the time service is to be effected, service may be made by leaving them between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office, or, if the attorney's office is not open so as to admit of that service, then service may be made by leaving the notice or papers at the attorney's residence, with some person of not less than 18 years of age, if the attorney's residence is in the same county with his or her office, and, if the attorney's residence is not known or is not in the same county with his or her office, or being in the same county it is not open, or there is not found thereat any person of not less than18 years of age, then service may be made by putting the notice or papers, enclosed in a sealed envelope, into the post office or a mail box, subpost office, substation, or mail chute or other like facility regularly maintained by the Government of the United States directed to the attorney at his or her office, if known and otherwise to the attorney's residence, if known. If neither the attorney's office

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[11] The attached service list stated plaintiff's address as 1241 West Second Street, Los Angeles, CA 90026, the address he had previously given notice was to be his address for further service of documents in this and the previous MSJ litigation.

nor residence is known, service may be made by delivering the notice or papers to the address of the attorney or party of record as designated on the court papers, or by delivering the notice or papers to the clerk of the court, or to the judge where there is no clerk, for the attorney.
(b) If upon a party, service shall be made in the manner specifically provided in particular cases, or, if no specific provision is made, service may be made by leaving the notice or other paper at the party's residence, between the hours of eight in the morning and six in the evening, with some person of not less than 18 years of age. If at the time of attempted service between those hours a person 18 years of age or older cannot be found at the party's residence, the notice or papers may be served by mail. If the party's residence is not known, then service may be made by delivering the notice or papers to the clerk of the court or the judge, if there is no clerk, for that party."

Respondents contend that there is no probability of plaintiff's prevailing on his abuse of process cause of action for several reasons, including that he was properly served (see *Parage v. Couedel* (1997) 60 Cal.App.4th 1037, 1040-41, 1043-44); that abuse of process requires more than improper service;[12] and that the litigation privilege (Civ. Code, § 47) bars the cause of action.

Appellant was served at the address he had supplied for service in the underlying litigation. The service may not have been "personal" in the sense of hand delivery to the person served. But the papers were placed in the only apparent receptacle at the designated location, and appellant has failed to

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[12] "In *Spellens v. Spellens* (1957) 49 Cal.2d 210, 232 [317 P.2d 613], the court sets out the essential elements of this tort as stated in Prosser on Torts (2d ed.) at page 667: '"first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The improper purpose *usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself*, such as the *surrender of property or the payment of money, by the use of the process as a threat or a club*. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.' (Italics in opinion.) [Citations.])" (*Templeton Feed and Grain v. Ralston Purina Co*. (1968) 69 Cal.2d 461, 465-466.)

demonstrate that service was improper under the applicable statute. Furthermore, even if his efforts to challenge such service were viewed as a motion to set aside that judgment, he has not demonstrated his likelihood of winning the underlying legal malpractice lawsuit on its merits, a requirement for setting aside the judgment for extrinsic fraud. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 982.)

Thus, "even if we were to assume service was inadequate, defective service alone is not a sufficient basis to vacate entry of a sister state judgment. Rather, a party '"must plead and prove that he has a meritorious case, i.e., a good claim or defense which, if asserted in a new trial, would be likely to result in a judgment favorable to him." [Citation.] [¶] And the rule will apply even where it is contended, . . . that necessary process was not served or was defective.' (*New York Higher Education Assistance Corp. v. Siegel* (1979) 91 Cal.App.3d 684, 688-689 [154 Cal.Rptr. 200].) *The same standard applies to a motion to vacate a judgment on the basis of extrinsic fraud or mistake*. (*Ibid*.; *Baske v. Burke* (1981) 125 Cal.App.3d 38, 46 [177 Cal.Rptr. 794].)" (*Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd*. (1993) 12 Cal.App.4th 74, 89-90, italics added; accord See 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 237, p. 751.)

There being no probability of success on the merits, the trial court properly granted respondents' anti-SLAPP motion as against Eilken's tort causes of action.

3. Attorney fees.

Respondents have requested attorney fees on appeal. Section 425.16, subdivision (c), provides that "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785; *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 362.)

"The appellate courts have construed section 425.16, subdivision (c), to include an attorney fees award on appeal. [Citations.] '"A statute authorizing an

attorney fee[s] award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise. [Citations.]"' (*Church of Scientology v. Wollersheim*, *supra*, 42 Cal.App.4th at p. 659 [].) Section 425.16 does not specifically provide otherwise. [¶] Accordingly, defendants are entitled to, and are awarded, their attorney fees on this appeal in an amount to be determined by the trial court on remand." (*Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 287-288.)

DISPOSITION

The order granting the special motion to strike is affirmed. Respondents shall recover costs and attorney's fees on appeal, the amount of which shall be determined by the trial court.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

COOPER, P.J.

We concur:

RUBIN, J. BOLAND, J.